

D.B. CIVIL SPECIAL APPEAL(W)NO.1206/2006

Shri Phalodi Enterprises, Chechat
Vs.
Associated Stone Industries Kota Ltd. & Anr.

DATE OF ORDER :: 09-02-2007

HON'BLE THE CHIEF JUSTICE SHRI S.N.JHA
HON'BLE SHRI JUSTICE MOHAMMAD RAFIQ

Shri Satish Pachori, for the appellant.

This special appeal is directed against the order of the learned Single Judge dismissing the writ petition of the appellant. The appellant had filed the writ petition challenging the order of the Additional District Judge, Ramganj Mandi rejecting its application for appointment of Commissioner.

The case of the appellant in brief is that respondent no.1, Associated Stone Industries Kota Ltd., is engaged in the work of cutting of stones on the strength of mining lease for excavating mines spread over a large area and in this connection has employed a large number of persons. The case of the appellant is that 200 workers of the respondent company represented by the appellant were allotted four pits falling within the mining area in lieu of wages. The case of the appellant further is that the respondent dug part of the pits which had been given to the said workmen and removed the dug/cut stones. In the circumstances, the appellant filed

suit for recovery of sum of Rs.2,38,309/- allegedly being value of the stones allegedly excavated and removed by the respondent, as also for prohibitory injunction restraining the respondents, its agents and employees from removing the stones dug from the site. In the suit they filed application for appointment of Commissioner.

In course of hearing, it was submitted that the application was filed in terms of rule 7 of Order 39 Civil Procedure Code which empowers the Court to pass orders for detention, preservation, inspection of any property which is subject matter of the suit. We are of the view that rule 7 of Order 39 does not contemplate appointment of Commissioner for which specific provisions are made in Order 26 of the Code of Civil Procedure. From a perusal of Order 26 it would appear that commissions are issued in different situations for different purposes. The relevant provision is rule 9 which deals with commissions to make local investigation. Rule 9 provides that in any suit in which the Court deems a local investigation to be requisite or proper for the purpose of elucidating any matter in dispute, or ascertaining the market-value of any property, or the amount of any mesne profits or damages or annual net profits, it may issue a commission to such person as it thinks fit directing him to make such investigation and to report thereon to the Court. However, rule 9 has been interpreted by various Courts and it has been held that

the Commissioner under rule 9 of Order 26 cannot collect evidence. Whether the stones at the site pertain to the pits allotted to the workers represented by the appellant cannot be decided by a Commissioner. The trial Court while considering the application observed that in the absence of identification mark, it is not possible to identify the source from which the stones have been dug. This in our opinion is a plausible view. We are of the opinion that exercise of power under Order 39 rule 7 CPC is discretionary in nature and it cannot be subject matter of further adjudication in writ jurisdiction except where the exercise or non-exercise is found to be arbitrary or likely to result in injustice. No such case is presently made out.

We thus find no error in the order of the learned Single Judge dismissing the writ petition of the appellant to warrant interference by the Division Bench.

The appeal is dismissed.

[MOHAMMAD RAFIQ], J.

[S.N. JHA], CJ.

Praveen